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February 28, 2006

Walter D. Cruickshank,
Acting Director, Minerals Management Service
Department of the Interior
United States of America
1849 C Street, NW
Washington, DC 20240

Re: Advance Notice of Proposed Rulemaking RIN 1010–AD30; Alternate Energy-Related Uses on the Outer Continental Shelf; Cape Wind Comments.

Dear Acting Director Cruickshank,

Cape Wind Associates, LLC ("CWA") hereby submits its comments to the Minerals Management Service ("MMS") regarding the Advance Notice of Proposed Rulemaking ("ANPR") published December 30, 2005, seeking comments on energy development from sources other than oil and gas and alternate uses of existing facilities on the outer Continental Shelf ("OCS"). CWA is a member of the American Wind Energy Association ("AWEA") and supports the industry's comments filed today by AWEA. As further discussed below, CWA believes that the offshore renewable energy industry has the potential to help the United States create a sustainable energy future by tapping a new and boundless source of clean electricity. However, the industry is presently in its infancy, and it will be many years before it realizes its full potential. Therefore, we urge MMS to first focus upon those relatively few projects, such as Cape Wind, that can provide significant public interest benefits utilizing today's technology and that will help the industry develop the practical experience and advances needed for more expansive future development.

More specifically, CWA respectfully requests that MMS not delay the review of individual lease applications pending completion of the above-mentioned rulemaking or any proposed program. Any such delay would be inconsistent with the will of Congress as embodied in Section 388 of the Energy Policy Act of 2005 ("Section 388" and "Energy Policy Act") and the Outer Continental Shelf Lands Act of 1953 ("OCSLA") (43 U.S.C. 1331 et seq.), which calls the OCS "a vital national resource reserve" that "should be made available for expeditious and orderly development…." 43 U.S.C. 1332. Any delay would further violate the federal energy policy declared in Executive Order 13212 ("Actions to Expedite Energy-Related Projects.") Therefore, we urge MMS to complete the regulatory review of the Cape Wind and other current projects in a timely manner.

I. Summary of the Cape Wind Project.

CWA is engaged in the development of an offshore wind energy project ("Cape Wind Project" or "Project") on submerged lands of the OCS off the coast of Massachusetts. The wind farm, which would be the nation's first offshore wind energy project and would be capable of generating up to 468 MW of clean and renewable energy, would be located entirely on submerged lands of the OCS, with a portion of the submerged transmission cable buried beneath the coastal seabed of Massachusetts. CWA has filed an application with MMS requesting leases, easements and/or rights-of-way, as appropriate, pursuant to Section 8 of the Outer Continental Shelf Lands Act of 1953 ("OCSLA") (43 U.S.C. 1331 et seq.), as recently amended by Section 388. The Cape Wind Project is now in the fifth year of a comprehensive and exhaustive environmental review process conducted jointly by federal and state regulatory agencies. This joint review will result in a Final Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), which defines the most comprehensive environmental review standard under Federal law, as well as a Final Environmental Impact Report ("EIR") under the Massachusetts Environmental Policy Act ("MEPA"). Until the passage of the Energy Policy Act, the joint review was led by the United States Army Corps of Engineers ("Corps") with seventeen participating agencies, including the Department of Interior ("Department").

In the course of its regulatory review, the Cape Wind Project has received favorable reviews from both state and federal regulators. In November 2004, after three years of study and analysis, the Corps issued a comprehensive and highly favorable Draft EIS on the Cape Wind Project. In a certificate dated March 3, 2005, the Secretary of Environmental Affairs for the Commonwealth of Massachusetts determined such document to be adequate under MEPA and, on that basis, authorized the proponent to prepare a Final EIR. In May 2005, the Massachusetts Energy Facilities Siting Board ("EFSB"), the adjudicatory body charged with ensuring a reliable energy supply for the Commonwealth with a minimum impact on the environment at the lowest possible cost, approved CWA's petition, finding that "the power from the wind farm is needed on reliability and economic grounds, and to meet the requirements of Massachusetts and regional renewable portfolio standards." Energy Facilities Siting Board, Final Decision, EFSB 02-2, May 10, 2005.

II. MMS Should not Delay the Review of Current Projects during its Rulemaking Process.

A. The Energy Policy Act does not require the development of an agency-initiated program, but merely that activities be carried out in a manner that protects the public interest.

As described by MMS in the ANPR, MMS has interpreted its authority under the Energy Policy Act broadly to give it jurisdiction to permit and manage alternate energy projects on the OCS. However, CWA notes that in the Energy Policy Act did not direct the Secretary of the Interior ("Secretary") to create a governmental "program," but, rather, authorized the Secretary to "grant a lease, easement, or right-of-way on the Outer Continental Shelf" for

renewable energy projects. While Congress further instructed the Secretary to "ensure that an activity carried out under this subsection is carried out in a manner that provides for— '(A) Safety; '(B) protection of the environment; '(C) prevention of waste; …", it also established a 270-day deadline for the Secretary to issue "any necessary regulations to carry out this subsection." Section 388 thus demonstrates that Congress did not intend to require an agency-initiated development "program;" it intended primarily for the Secretary assume a licensing role for proposed projects. CWA thus urges MMS to restrict its initial focus required to developing any regulations necessary for the expeditious review of permit applications.

B. The Energy Policy Act does not require a rulemaking or the development of any program prior to action on preenactment applications.

Notably, nowhere in Section 388 did Congress indicate that the regulatory review of preenactment proposals should be halted pending the required rulemaking. To the contrary, Congress displayed a clear intent in the "savings clause" of Section 388 that the regulatory review of preenactment proposals should proceed without disruption by exempting such projects from having to resubmit any prior filings or to seek any reauthorizations:

> (d) SAVINGS PROVISION.—Nothing in the amendment made by subsection (a) requires the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act—
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> (1) an offshore test facility has been constructed; or
> (2) a request for a proposal has been issued by a public authority.

Section 388 also exempts such projects from competitive bidding for the respective sites that had been proposed by the applicants prior to enactment, a further indication that review of such proposals should not be delayed pending the creation of future governmental development programs. Thus, MMS should not delay the regulatory review of Cape Wind or other preenactment projects in order to conduct processes that are not required by the authority granted by Congress. As further described below, the NEPA process provides a comprehensive forum under which the potential environmental and socio-economic impacts of preenactment projects will be fully analyzed. Hence, there is no informational reason to delay the completion of regulatory review of such projects until the rulemaking is completed.

C. The Bureau of Land Management did not delay the review of individual projects while it performed its recent programmatic review of onshore wind energy development.

Even if MMS were to elect to develop a comprehensive program for government-sponsored development, a moratorium on current projects would still not be required. For example, although the Bureau of Land Management ("BLM") recently released a Final

Programmatic EIS regarding wind energy development on public lands administered by the BLM, the BLM did not delay or suspend the regulatory review of individual project applications while it performed its programmatic review. Indeed, Section 2.4.2 of the BLM's Final Programmatic EIS expressly lists several proposed wind projects undergoing environmental review under NEPA concurrent with the programmatic review. Recent practice from within the Department of Interior thus confirms that it would not be necessary to delay the review of individual applications pending development of a potential comprehensive program.

D. NEPA caselaw confirms that MMS need not halt action upon individual applications unless and until a program is developed.

Federal case law under the NEPA similarly confirms that agencies are not required to complete the study and development of a comprehensive "program" prior to acting upon individual project applications. In the seminal case of Kleppe v. Sierra Club, et al., 427 U.S. 390 (1976) ("Kleppe"), the United States Supreme Court rejected the position that it was improper for a Federal agency to permit four privately-initiated coal projects, located within a single coal basin, until such time as a program respecting the development of coal resources within the region had been implemented, as follows:

> Nor is it necessary that [Federal agencies] always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others…. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals.

Id. at 414-415, n.26. Thus, it is clear that the review of individual projects may proceed prior to, or concurrent with, the development of any potential comprehensive or programmatic activities that MMS may choose to pursue.

Numerous other federal court decisions under the NEPA similarly uphold the review of individual projects prior to the implementation of a comprehensive program. In Jicarilla Apache Tribe of Indians et al., v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973), the Court upheld the review and permitting of six coal-fired electric generating facilities in the Southwest region, prior to the completion of a regional study of the effects of further development of coal-fired electric power facilities. The Court found the individual EISs for such projects to be sufficient, and explained that NEPA does not place an effective "moratorium" on individual project review and development until all proposed or pending studies are complete, a situation which might never occur:

> If we were to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated. … At any point in time, there are likely to be any number of studies underway concerning a host of environmental or other societal problems. What appellants seek is for this court to substitute its judgment for that of the secretary, who is charged by NEPA with preparing a thorough statement of the environmental consequences of a proposed project, as to what particular information will be required to complete that statement. We decline to assume that role. Id. at 1280.

Also see, e.g., In Churchill County v. Norton, 276 F.3d 1060 (9th Cir. 2001) (Upholding the Interior Secretary's decision to proceed on the individual water sales prior to completion of on a broad based water management program for the region, noting that "it simply makes sense to 'defer detailed [program] analysis until a concrete development proposal crystallizes the dimensions of a project's probable environmental consequences.'" Id. at 1078, quoting Kleppe, 427 U.S. at 406-07); National Wildlife Federation, et al. v. FERC, 912 F.2d 1471, (D.C. Cir. (1990)) (Cumulative EIS not required for "Phase I" of a hydro project where Phase II remained speculative.)

III. MMS Should Complete the Review of Pending Applications in an Expedited Manner.

A. Executive Order 13212 requires prompt action on energy proposals.

MMS should conduct the review of CWA's pending lease application in a manner consistent with Executive Order 13212, "Actions to Expedite Energy-Related Projects." In recognition of the need "to take additional steps to expedite the increased supply and availability of energy to our Nation," the President has directed each Federal Agency to conduct its statutory review of proposed energy facilities in an expedited manner, as follows:

> The increased production in transmission of energy in a safe and environmentally sound manner is essential to the well being of the American people. In general, it is the policy of this Administration that executive departments and agencies shall take appropriate actions to the extent consistent with applicable law, to expedite energy projects that will increase the production, transmission, or conservation of energy. … For energy-related projects, agencies shall expedite the review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

Id, emphasis added. Further, as discussed below, the policy directives behind Executive Order 13212 are heightened with respect to the Cape Wind Project.

B. The Cape Wind Project is needed to help solve an imminent energy crisis in the New England region.

The need to proceed expeditiously on the Cape Wind Project is further demonstrated by to the looming electric reliability crisis in New England, which faces the threat of regional blackouts as early as this year. The Cape Wind Project is one of the few major generation project currently undergoing regulatory review in New England, and by far the most advanced. The Boston Globe ("Winter May Bring Rolling Blackouts") reported in November that "Electricity officials are bracing for unprecedented rolling blackouts if New England faces a severe cold snap that overtaxes supplies of natural gas used for both heating homes and generating power," and that "blackouts may be unavoidable." On September 20, 2005, FERC Commissioner Kelliher similarly warned that "there is a problem in New England's wholesale markets that cannot be ignored, namely, the collapse of generation additions" and that "current reserve margins are barely adequate at best, and more severe supply problems threaten just over the horizon." The Chairman further noted his concern that "the situation in New England bears an uncomfortable resemblance to the situation facing California in the late 1990s [i.e., prior to regional blackouts.]" Chairman's Opening Statement in Docket No. ER03-563-030, September 20, 2005.

Likewise, the independent system operator of the New England wholesale electricity system, ISO New England, Inc. ("ISONE"), recently completed its 2005 Regional System Plan ("RSP05") for New England, which sets forth ISONE's similar conclusions and recommendations for maintaining a reliable regional bulk power system. Most importantly, the RSPO5 recognized (i) New England's "urgent need" for new generation resources to maintain system reliability [Id. at ES-9], (ii) the immediate need for greater fuel diversity in the region's electrical generation (Id. at 75), and (iii) the resulting need to "aggressively pursue" the development of renewable generating resources that would not impose further demand upon New England's fuel supply infrastructure:

> Approximately two-thirds of New England's supply portfolio depends on natural gas and oil for its primary fuel. These fuels have a high price volatility, and their availability is increasingly dependent on imports. This reliance on gas and oil places New England's electricity supply at risk. As discussed later in this chapter, the viable alternative energy sources in the region are limited, and the ISO believes New England should more aggressively pursue energy conservation, demand response, and the development of renewable resources.

Id. at 67 (emphasis added), 114 ("The ISO supports a much more aggressive pursuit of alternative fuel sources as a means of diversifying the region's fuel supply and reducing price risks in the future.") Still, Cape Wind Project remains one of the very few generation projects currently undergoing regulatory review in New England. In light of the growing consensus that New England faces an imminent electric reliability crisis with few timely alternatives, further delays in the review of the region's only major generation proposal are neither in the public interest nor consistent with Executive Order 13212.

C. The Cape Wind Project will assist in compliance with Federal renewable energy objectives and provide a "critical first step" for future development.

Although originally undertaken in response to the Massachusetts Electric Restructuring Act of 1997 ("Massachusetts Electric Restructuring Act"), which established renewable portfolio standards and declared renewable energy to be a "public purpose," the Cape Wind Project is also consistent with a number of Federal renewable energy policies embodied within the Energy Policy Act. Along with extending the production tax credit for renewable energy, the Energy Policy Act detailed new renewable energy policies that impact wind energy projects on offshore lands. In particular, in Section 211 of the Energy Policy Act, Congress called upon the Secretary of the Interior to "before the end of the 10-year period beginning on the date of enactment of this Act, seek to have approved non-hydropower renewable energy projects on public lands with a generation capacity of at least 10,000 megawatts of electricity." Cape Wind will assist in meeting these goals, while fostering an important breakthrough in American energy independence, as confirmed by the following statement of the United States Department of Energy:

> As the first shallow water offshore project under review in the United States, utility-scale projects like Cape Wind are important to our national interest and a critical first step to building a domestic, globally competitive wind industry. Success in this project could also lay the foundation for a focused national investment to develop offshore wind technology in the coming years.
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> Projects like Cape Wind are responsive to the Administration's policy to increase renewable energy development on Federal lands and to reduce air emissions in collaboration with the private sector. We commend the vision, leadership and action by all parties to this project and their efforts to move our nation towards a sustainable energy future.

Letter of the USDOE Asst. Secretary David K. Garman to the Corps, March 31, 2005.

IV. Conclusion.

CWA adopts the general comments of the industry filed today by the AWEA. CWA further respectfully requests that MMS expeditiously complete the review of pending applications in a manner consistent with Executive Order 13212 and the intent of Congress. Any delay would be inconsistent with the will of Congress, settled case law and federal energy policy and, further, would exacerbate the imminent threat to the public health and welfare presented by New England's looming energy crisis. CWA urges MMS to first focus upon those relatively few OCS projects that will be commercially feasible in the foreseeable future, and then turn to other matters, once the industry has gained meaningful experience and achieved technological advances.

Sincerely,

Dennis J. Duffy
Vice President of Regulatory Affairs